Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

KEVIN M. McGUINNESS,
Petitioner,

vs.

UNIVERSITY OF NEW MEXICO SCHOOL OF MEDICINE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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1. QUESTIONS PRESENTED

- Whether a disability should be assessed without regard to the availability of mitigating measures.
- Whether a history of mitigation by an individual with a disability, while allowing the individual to achieve roughly average skills (on some measures) when compared to the average population, does not take the individual outside of the protective provisions of the Americans With Disabilities Act.
- Whether a person's ability to mitigate the effects of a disability does not foreclose a finding of disability.
- Whether a disability impairing the manner or condition under which an individual can learn or perform in a specific basic subject does affect a major life activity.
- Whether, if an individual is substantially limited in any other major life activity, the ADA applies and no determination should be made as to whether the individual is substantially limited in working.
- Whether grading policies which systematically handicap persons with learning disabilities based upon an arbitrary standard are illegal.

2. PARTIES TO THE PROCEEDING

In addition to the parties identified in the caption, the Regents of the University of New Mexico should be regarded as the legal entity representing the University of New Mexico School of Medicine.

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5. CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is set forth in Appendix A beginning at p. 11-I. The decision of the United States District Court for the District of New Mexico is set forth in Appendix B beginning at p. 12-I.

6. STATEMENT OF JURISDICTION

On July 3, 1997, the United States District Court for the District of New Mexico granted summary judgment in favor of Respondent. Petitioner appealed to the United States Court of Appeals for the Tenth Circuit. On November 4, 1998, the United States Court of Appeals for the Tenth Circuit affirmed the District Court's granting of summary judgment. This court has jurisdiction to review the case under 28 U.S.C. §1254.

7. STATUTES INVOLVED

42 U.S.C §12112 ("Discrimination") provides:

- (a) General rule No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

- (b) Construction As used in subsection (a) of this section, the term "discriminate" includes –

  - (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

  - (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an

organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

- (3) utilizing standards, criteria, or methods of administration

- (A) that have the effect of discrimination on the basis of disability; or

- (B) that perpetuate the discrimination of others who are subject to common administrative control;

- (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

- (5)
  - (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

- (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

- (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

- (7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

42 U.S.C. §12132 of the ADA provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. "

New Mexico Statutes Annotated 1978 §13-403 (Uniform Jury Instructions, Civil) provides:

> Employee-employer; definition (master and servant).
>
> An employer is one who has another perform certain work and who has the right to control the manner in which the details of the work are to be done, even though the right of control may not be exercised. The person performing the work is the employee.

8. STATEMENT OF THE CASE

On November 25, 1995, Dr. McGuinness filed a complaint in the United States District Court for the District of New Mexico. The complaint and related pleadings alleged that Dr. McGuinness had informed the School of Medicine that he suffers from an Anxiety Disorder related to learning. Dr. McGuinness fully described to his Professor the symptoms of his disorder as they

were likely to be manifest in the first year Basic Biochemistry course. He further alleged that he requested reasonable accommodation from his Basic Biochemistry professor limited to the context of non-discriminatory course evaluation standards. Dr. McGuinness, himself a licensed clinical psychologist, alleged that the school referred him to a clinical psychologist for assistance and affirmed to him that he would be evaluated using the pre-set competency based standards described in the grading policy and that his evaluation would not be based upon competition with others not similarly disadvantaged. The District Court, relying upon a textually incorrect grading policy provided by the School of Medicine, concluded that the policy was properly applied. The court, renaming Dr. McGuinness' disorder as "test anxiety disorder", and concluding that it "is widely shared" and applying a standard of "special" not "reasonable accommodation" held that Dr. McGuinness was not disabled for the purposes of the ADA. It held that, as Dr. McGuinness was economically successful as a result of his personal efforts to mitigate the impact of his impairment, he was removed from the protective provisions of the ADA. Defining the term "employee" using a federal standard, it held that Dr. McGuinness was not an employee and, therefore, not entitled to consideration of his claim that the school had discriminated against him on the basis of his association with his son who suffers from cerebral palsy. Dr. McGuinness appealed the decision of

the District Court on June 5, 1998. The 10th Circuit Court of Appeals affirmed on November 4, 1998. This petition for a writ of certiorari to the 10th Circuit Court of Appeals follows.

9. REASONS FOR GRANTING THE WRIT

A. THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE TO CORRECT THE TENTH CIRCUIT'S IGNORING THE IMPORT OF THE OPINION IN BRAGDON vs. ABBOTT AND CONTINUING TO ADDRESS DISABILITY ISSUES WITH REGARDS TO THE "PUBLIC, ECONOMIC OR DAILY DIMENSION" OF THE DISABILITY

Pursuant to Supreme Court Rule 14 (1)(i)(ii), Appendix C to this petition sets forth the complete text of an August 19, 1994, finding by the United States Department of Education that Petitioner was a person protected under the Americans With Disabilities Act, that his disability was recognized under the ADA, and that Petitioner had been discriminated against by the Respondents. (Appendix C, pp. 13-I et seq.) The Tenth Circuit Court of Appeals reached opposite conclusions, employing a rationale that conflicts with rulings of this Court.

In Bragdon v. Abbott, _____ U.S. _____, 118 S.Ct. 2196, 2205, 141 L.Ed.2d 540 (1998), this Court made clear that

> The argument [that Congress intended the ADA only to cover those aspects of a person's life which have a public, economic or daily character] founders on the statutory language. Nothing in the definition suggests that activities without a public, economic, or daily dimension may somehow be regarded as so unimportant or insignificant as to fall outside the meaning of the word "major." The breadth of the term confounds the attempt to limit its construction in this manner.

In stark contrast to *Bragdon vs. Abbott*, the Tenth Circuit Court of Appeals in this case has ruled that:

> Mr. McGuinness must demonstrate that his anxiety impedes his performance in a wide variety of disciplines .... (Tenth Circuit Opinion at p.4, Appendix A at p. 11-X)

Without benefit of a trial, the Tenth Circuit has made a determination that Petitioner's disability has no impact apart from the areas in which Petitioner requested accommodation. There is no record below to support such a limitation on the impact of Petitioner's disability, and his disability is, in fact, not so limited. More significantly, however, the analysis applied by the Tenth Circuit in effect requires Petitioner to demonstrate that his disability is of a "public, economic or daily dimension", in direct conflict with this Court's holding in *Bragdon vs. Abbott*. As regards the existence of Petitioner's condition

and its expected duration, the trial court found that Petitioner's Anxiety Disorder "probabl[y] ... will be life-long." (District Court Opinion at p.5, Appendix B at p. 12-VII).

This Court should grant certiorari in this case to correct the Tenth Circuit's disregard for the import of the Court's decision in *Bragdon*.

B. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE ROLE OF MITIGATING MEASURES ON THE FINDING OF DISABILITY. THE TENTH CIRCUIT'S RATIONALE IN THIS REGARD IS DIAMETRICALLY OPPOSED TO THE APPROACH ADOPTED BY ALL OTHER CIRCUITS AND THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC).

The Tenth Circuit's opinion in this case gives passing acknowledgment of the Supreme Court's decision in *Bragdon vs. Abbott*, but treats the decision as if this Court left unanswered the issue of how mitigation by the affected individual of the effects of an impairment will be weighed by the Courts. Bragdon, ____ U.S. at ____, 118 S.Ct. at 2206. The *Bragdon* opinion, however, in fact does acknowledge the existence of statutory language dictating that disability is to be assessed without consideration of mitigating measures. Id., citing Brief for United States as Amicus Curiae 18, n. 10 (citing 28 CFR pt. 36,

App. B, p. 611 (1997); 29 CFR pt. 1630, App., p. 351 (1997)) Moreover, this Court clearly stated in Bragdon that the affected individual's ability to surmount his impairment was irrelevant to the inquiry of coverage under the ADA. This case presents the Court with the opportunity to clarify this pressing and timely issue.

The Tenth Circuit McGuinness opinion says:

- An individual's ability to mitigate his impairment must be considered in determining whether that impairment substantially limits a major life activity. (Tenth Circuit Opinion at p.4, Appendix A at p. 11-X)
- A history of successful self-mitigation of a disability takes the successful individual outside of the protection of the ADA. (Tenth Circuit Opinion at p.5, Appendix A at p. 11-X)
- A person's ability to mitigate his own disability forecloses a determination of disability under the ADA. (Tenth Circuit Opinion at p.8, Appendix A at p. 11-X)

In *Bragdon vs. Abbott*, this Court held that

> When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable. ___ U.S. at ____, 118 S.Ct. at 2206. (Emphasis added.)

This aspect of the *Bragdon* decision is in step with the majority of all federal court

decisions, and with the United States Equal Employment Opportunity Commission's views. ADA cases in which courts have disregarded the positive effects of medications or other treatment in the determination of disability include *Canon v. Clark*, 883 F. Supp. 718, 4 AD Cas. (BNA) 734 (S.D. Fla. 1995)(finding that individual with insulin-dependent diabetes stated an ADA claim), and *Sarsycki v. United Parcel Ser.*, 862 F. Supp. 336, 340, 3 ADCas. (BNA) 1039 (W.D. Okla. 1994) (stating that substantial limitation should be evaluated without regard to medication and finding that an individual with insulin-dependent diabetes had a disability under the ADA). Pertinent Rehabilitation Act cases in which courts have made similar determinations include *Liff v. Secretary of Transp.*, 1994 WL579912, at *3-*4 (D.D.C. 1994) (deciding under the Rehabilitation Act, after acknowledging pertinent ADA guidance, that depression controlled by medication is a disability), and *Gilbert v. Frank*, 949 F.2d 637, 641, 2 ADCas. (BNA) 60 (2d Cir. 1991) (determining under the Rehabilitation Act that an individual who could not function without kidney dialysis had a substantially limiting impairment).

In direct contravention of this principle, the Tenth Circuit, in the case at bar, held that

> Mr. McGuinness admits that, in the past, he has been able to mitigate his anxiety in chemistry and math by altering his study habits. See Aplt. App. at 19-20. Under the law of this circuit, we must consider the

plaintiff's ability to mitigate his impairment in determining if that impairment substantially limits a major life activity. See Sutton, 130 F.3d at 902-3. Just as eyeglasses correct impaired vision, so that it does not constitute a disability under the ADA, an adjusted study regimen can mitigate the effects of test anxiety. See id. at 903.

In the instant case, McGuinness has earned college degrees and pursued a career in the subjects that trigger his anxiety. While he experienced difficulties in his first-year of medical school, his poor performance did not require that he leave the program: He could have repeated the first year. As we held in Sutton, "it is the actual effect on the individual's life that is important in determining whether an individual is disabled under the ADA." Id. at 902. For the purposes of the ADA, inability to pursue one career, such as medicine, does not constitute a severe impact on an individual's life. See, e.g, Welsh v. City of Tulsa, 977 F.2d 1415, 1419 (10th Cir.1994) (holding that plaintiff was not disabled under the Rehabilitation Act, which defines "disability" the same way as the ADA, merely because he could not be a firefighter). (Tenth Circuit Opinion at 8-9, Appendix A at p. 11-XI; *see* Sutton v. United Airlines, Inc., 130 F.3d 893 (10th Cir. 1997))

As shown, the reasoning adopted by the Tenth Circuit in *Sutton,* and now in *McGuinness,*

is in conflict with that of every other circuit that has addressed the issue. The Tenth Circuit has repeatedly been subject to internal inconsistencies on this issue. In *Sutton,* the 10th Circuit cited to and relied upon the dissenting opinion in *Gilday_v. Mecosta County*, 124 F.3d 760, 767-68 (6th Cir 1997) (Kennedy, J., concurring in part and dissenting in part) and (Guy, J., concurring in part and dissenting in part), as if the dissent were the majority holding. Sutton, 130 F.3d at 901, fn 8. The Tenth Circuit erroneously looked upon *Gilday* as the only federal case supporting its reasoning as regards mitigation of an impairment. In fact, the majority holding in *Gilday* is exactly the opposite. The 10th Circuit court repeated its error by relying upon *Sutton* in its *McGuinness* opinion.

The 10th Circuit is also in conflict with EEOC regulations and the legislative history of the ADA as well. Cases in which courts have found that individuals are not substantially limited after considering the positive effects of medication are, in the United States Equal Opportunity Commission's view, incorrectly decided. See EEOC Enforcement Guidance on Psychiatric p. 7, n.22, citing as examples Mackie v. Runyon, 804 F. Supp. 1508,1510-11, 2 AD Cas. (BNA) 260 (M.D. Fla. 1992)(holding under section 501 of the Rehabilitation Act that bipolar disorder stabilized by medication is not substantially limiting); Chandler v. City of Dallas, 2 F.3d 1385, 1390-91, 2 AD Cas. (BNA) 1326 (5th Cir. 1993)(holding

under section 504 of the Rehabilitation Act that an individual with insulin-dependent diabetes did not have a disability), *cert.denied*,114 S. Ct. 1386, 3 AD Cas. (BNA) 512 (1994).

Consistent with the guiding principle laid out in *Bragdon*, every other circuit considering the issue has held that the determination of whether a condition constitutes an impairment, and the extent to which the impairment limits an individual's major life activities, is made without regard to the availability of mitigating measures. *See* Arnold v. United Parcel Svc., 136 F.3d 854 (1st Cir. 1998), Bartlett v. NYS Law Examiners 156 F.3d 321 (2nd Cir. 1998); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933 (3d Cir. 1997); Washington v. HCA Health Services of Texas, Inc., 152 F.3d 464 (5th Cir. 1998); Gilday v. Mecosta County, 124 F.3d 760 (6th Cir.1997), Baert v. Euclid Beverage, Ltd., 149 F.3d 626 (7th Cir. 1998), Doane v. City of Omaha, 115 F.3d 624, 627 (8th Cir. 1997), Holihan v. Lucky Stores, Inc., 87 F.3d 362, 366 (9th Cir. 1996), Harris v. H & W Contracting Co., 102 F.3d 516, 520-21 (11th Cir. 1996)

The Courts are not to consider mitigating measures in determining whether an individual is disabled. 29 C.F.R. §1630.2(h)(App.) The court in *Arnold v. United Parcel Service, Inc.* (See also Matczak v. Frankford Candy; Washington v. HCA Health Services) eloquently states:

> Both the explicit language and the illustrative examples included in the ADA's

legislative history make it abundantly clear that Congress intended the analysis of an "impairment" and of the question whether it "substantially limits a major life activity" to be made on the basis of the underlying (physical or mental) condition, without considering the ameliorative effects of medication, prostheses, or other mitigating measures. For example, the House and Senate Committee reports explicitly state that, in determining whether an impairment substantially limits a major life activity, the impairment "should be assessed without considering whether mitigating measures, such as auxiliary aids or reasonable accommodations, would result in a less-than-substantial limitation." H.R. Rep. No. 101-485, pt. III, at 28 (1989), reprinted in 1990 U.S.C.C.A.N. 445, 451 (House Judiciary Report); see H.R. Rep. No. 101-485, pt. II, at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 334 ("House Labor Report") (The determination whether an individual has a "disability" within the scope of ADA coverage "should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids."); S. Rep. No. 101-116, at 23 (1989) ("Senate Report")(same). Arnold v. United Parcel Svc., 136 F.3d 854, 859 (1st Cir. 1998), *citing* Wilson v. Pennsylvania State Police Dep't, 964 F.Supp. 898, 904 (E.D.Pa.1997).

In fact, the legislature, the vast majority of Circuit Courts of Appeal, and the U. S. Supreme Court have recognized that it is not only ill-advised but illogical to determine that a method of mitigation exists for a disability unless a determination has first been made that there is an impairment that requires mitigation. If a court recognizes that an individual has mitigated an impairment successfully or unsuccessfully, there must first be an impairment of a nature significant enough to warrant mitigation. *See, e.g.,* Harris v. H & W Contracting Company. The Code of Federal Regulation is in complete agreement with this approach, including in its guidance that:

> *The determination* of whether an individual is substantially limited in a major life activity *must be made on a case by case basis, without regard to mitigating measures such as medicines,* or assistive or prosthetic devices. 29 C.F.R. app. § 1630.2(j) (1996) (emphasis added).

In *Bragdon*, this Court observed that the views of the EEOC are of crucial importance in the interpretation of the ADA, stating that

> the well-reasoned views of the agencies implementing a statute "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Bragdon, 118 S.Ct. at 2207, quoting Skidmore v. Swift & Co., 323 U.S.

134, 139-140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944).

This Court should grant certiorari to lay to rest, once and for all, any divergence of opinion regarding the mitigation issue.

C. THIS COURT SHOULD GRANT CERTIORARI TO STRENGTHEN ITS POSITION AGAINST STEREOTYPING IN THE CONTEXT OF DISABILITY DISCRIMINATION. THE TENTH CIRCUIT COURT'S DECISION IS BASED UPON IRRATIONAL PREJUDICE AGAINST PEOPLE WHO, LIKE DR. McGUINNESS, SUFFER FROM PSYCHIATRIC CONDITIONS ABOUT WHICH THERE ARE COMMON ERRONEOUS BELIEFS.

In its Memorandum Opinion and Order the District Court stated that:

> Plaintiff asserts that he qualifies for protection under the ADA because he suffers from a test anxiety disorder related to learning in the specific subject areas of chemistry and mathematics that substantially limits a major life activity. (District Court Opinion at p.5, Appendix B at 12-VII)

In fact, Dr. McGuinness has never described his disability with the term "test anxiety disorder". No such disorder exists in the accepted diagnostic manual. The only diagnosis relevant to this case is "Anxiety Disorder", a diagnosis recognized in the Diagnostic and Statistical

Manual, and appearing in published lists of disabling disorders accepted by the United States Equal Employment Opportunity Commission. The term used by the trial court in this case is a phrase of convenience, one which seems to linguistically smooth the path towards the judicial result that was reached. The coined diagnosis "test anxiety disorder" represents nothing more than the perpetuation of "irrational prejudice against people suffering from such medical condition[s]" as Anxiety Disorder. Such stereotyping operates to unfairly and erroneously trivialize the disability.

The District Court goes on to state that Dr. McGuinness'

> impairment of feeling test anxiety in two discrete subject matters that do not require special accommodations in testing situations is neither significant nor severe. (District Court Opinion at p.5, Appendix B at 12-VII)

And that

> Plaintiff has demonstrated that he can overcome this "impairment" simply by studying harder and longer than other individuals have to. (District Court Opinion at p.5, Appendix B at 12-VII)

However, on appeal the 10th Circuit Court held that Dr. McGuinness, in advance,

> requested only that the professor set clear grading standards for the course and not

regard him as lazy. (Tenth Circuit opinion a p.2, Appendix A, p. 11-IV)

Dr. McGuinness asked for standards, feedback, and structure so that he could plan effectively. Disregarding this most essential and reasonable of accommodations, an accommodation specifically included in the EEOC Interpretive Guidance on Psychiatric Disabilities, the 10th Circuit Court drew and applied to Dr. McGuinness an impermissible medical conclusion reserved to licensed psychologists and licensed psychiatrists. The court made a diagnostic decision based upon stereotype in the face of reasoned medical judgment to the contrary. It decided that Dr. McGuinness did not belong in the category of persons with the severe impairment in concentration, memory and other symptoms associated Anxiety Disorder, but rather that he was just another person with common test anxiety. Based upon this irrational prejudice it went one step further and made a prescriptive decision based upon its diagnosis. The court concluded "an adjusted study regimen can mitigate the effects of test anxiety."

Both the trial and the appellate court closed their ears and eyes to the differences between Dr. McGuinness' diagnosed Anxiety Disorder and prejudged him as suffering from common, minor test anxiety. While it may be true that "an adjusted study regimen can mitigate the effects of [common] test anxiety", the fact remains that Dr. McGuinness' case has nothing at all to do with

common test anxiety. The inability of this court to escape this stereotypical predisposition once again affirms that the grip of prejudice is powerful indeed.

Attempting to weaken the grip of prejudice, the EEOC has provided interpretive guidance which disagrees with the 10th Circuit's reasoning, stating:

> The ADA rule defines "mental impairment" to include "[a]ny mental or psychological disorder, such as emotional or mental illness." Examples of "emotional or mental illness[es]" include major depression, bipolar disorder, anxiety disorders (which include panic disorder, obsessive compulsive disorder, and post-traumatic stress disorder), schizophrenia, and personality disorders. The current edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (now the fourth edition, DSM-IV) is relevant for identifying these disorders. The DSM-IV has been recognized as an important reference by courts and is widely used by American mental health professionals for diagnostic and insurance reimbursement purposes. (EEOC Enforcement Guidance on the Americans With Disabilities Act and Psychiatric Disabilities, p.3)

The EEOC Guidance supports Dr. McGuinness' requested accommodation, clarifying that:

> [a]djusting the level of supervision or structure sometimes may enable an otherwise qualified individual with a disability to perform essential job functions. For example, an otherwise qualified individual with a disability who experiences limitations in concentration may request more detailed day-to-day guidance, feedback, or structure in order to perform his job.
>
> Example: An employee requests more daily guidance and feedback as a reasonable accommodation for limitations associated with a psychiatric disability. In response to his request, the employer consults with the employee, his health care professional, and his supervisor about how his limitations are manifested in the office (the employee is unable to stay focused on the steps necessary to complete large projects) and how to make effective and practical changes to provide the structure he needs. As a result of these consultations, the supervisor and employee work out a long-term plan to initiate weekly meetings to review the status of large projects and identify which steps need to be taken next." (EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities, p.27)

This court has been definitive in prohibiting reliance upon erroneous information and irrational prejudgment in the administration of justice. In *School Bd. of Nassau County v. Arline*, 480 U.S.

273, 284 & n.13, 107 S.Ct. 1123, 94 L.Ed.2d 307 (1987) (discussing the purpose of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794), this Court held that

> The ADA protects such individuals from discriminatory actions by some employers who might erroneously believe the individual's medical condition renders [him] unable to do the particular job for which [he] has applied, or who might harbor an irrational prejudice against people suffering from such medical conditions.

In *J.E.B. v. Alabama Ex Rel. T.B.*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), This court again spoke out against irrational prejudice, stating

> The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders. 511 U.S. at 140, 114 S.Ct. at 1427.

D. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY THE MEANING OF "EMPLOYMENT" WITHIN THE STATUTORY SCHEME OF TITLE I OF THE AMERICANS WITH DISABILITIES ACT. IN THE FACE OF AMBIGUOUS LANGUAGE IN THE FEDERAL STATUTE, THE TENTH CIRCUIT AND THE

TRIAL COURT FAILED TO DEFER TO THE DEFINITION OF "EMPLOYEE" FOLLOWED BY THE STATE OF NEW MEXICO.

As in the Americans with Disabilities Act, other federal statutes define the term "employee" as an individual "employed by an employer. In *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318 (1992) this court held that such a

> nominal definition of "employee" is completely circular, and explains nothing, and the Act contains no other provision that either gives specific guidance on the term's meaning or suggests that construing it to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results. 503 U.S. at 319.

The *Nationwide Mut. Ins. Co* opinion continues, stating:

> The term "employee," as used in ERISA, incorporates traditional agency law criteria for identifying master-servant relationships. Where a statute containing that term does not helpfully define it, this Court presumes that Congress means an agency law definition unless it clearly indicates otherwise. See, e.g., Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739-740.

In Dr. McGuinness' case, the Tenth Circuit court of Appeals held

> To state a claim under Title I of the ADA, the defendant must be "an employer, employment agency, labor organization, or joint labor-management committee" that employs the plaintiff. 42 U.S.C. §12111(2)(4). Mr. McGuinness has failed to show the existence of such an employment relationship between himself and the medical school. Unless a student receives remuneration for the work he performs, he is not considered an employee. See O'Connor v. Davis, 126 F.3d 112, 116 (2d Cir.1997), cert. denied, — U.S. —, 118 S.Ct. 1048, 140 L.Ed.2d 112 (1998).

The court goes on to state:

> The fact that Mr. McGuinness completed federal employment applications, took a federal oath of office, and was covered by the New Mexico Tort Claims Act, see Aplt. Br. at 39, does not make him an employee of a state-run medical school. An organization, such as a university, may confer certain benefits on an individual and exercise a modicum of control over him without establishing a master-servant relationship. *See* Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 72-73 (8th Cir.1990). Thus, as a threshold matter, Mr. McGuinness failed to establish the employment element of his Title I claim.

In its analysis, the Tenth Circuit ignored the fact that the legislature of the State of New

Mexico has explicitly defined the employer-employee relationship. New Mexico Statutes Annotated 1978 §13-403 (Uniform Jury Instructions, Civil) provides:

> Employee-employer; definition (master and servant).
>
> > An employer is one who has another perform certain work and who has the right to control the manner in which the details of the work are to be done, even though the right of control may not be exercised. The person performing the work is the employee.

The New Mexico Uniform Jury Instruction cited utilizes a well-established agent/principle concept in defining who is an "employee." The appellate court, applying federal case law from other federal circuits, denied Dr. McGuinness' claim that he was, for the purposes of the ADA and the Rehabilitation Act, an "employee employed by an employer." Despite the explicit language in the New Mexico statute, the court specifically cited the lack of more than a "modicum of control" exercised by the University, the lack of "remuneration", and the absence of a "master-servant relationship."

Under the circumstances and in light of the ambiguous language of the ADA, the Tenth Circuit Court should have applied the explicit definition of the employer-employee relationship applied by the state of New Mexico when deciding the

dispute between Dr. McGuinness and the University of New Mexico a state agency under the doctrine of the law of the case. This Court should grant certiorari in this case to review and clarify the analytical framework for the federal courts in addressing employer-employee issues within the context of the ADA.

E. THIS COURT SHOULD GRANT CERTIORARI BECAUSE, DISREGARDING EXPRESS GUIDANCE FROM THIS COURT AND FROM THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE TENTH CIRCUIT AND THE TRIAL COURT ADDRESSED APPELLANT'S ABILITY TO WORK AS A DECISIVE FACTOR, RATHER THAN WHETHER HIS DISABILITY IMPACTED A MAJOR LIFE ACTIVITY.

In the present case, the Tenth Circuit Court held that Dr. McGuinness was not an employee for the purposes of the ADA, yet treated Dr. McGuinness' complaint as though he were in a job training status. Such status is also covered under the provisions of Title I of the ADA, 42 U.S.C. §12112 (Discrimination)

> No covered entity shall discriminate against a qualified individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and

other terms, conditions, and privileges of employment.

Accordingly his complaint falls within Title I of the ADA.

The court below held

> In employment cases, we have held that an individual does not suffer a disability under the ADA if his disability does not prevent him from performing "a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." Siemon v. AT & T Corp., 117 F.3d 1173, 1176 (10th Cir.1997) (quoting 29 C.F.R. § 1630.2(j)(3)(1). For example, in *MacDonald v. Delta Airlines, Inc.*, 94 F.3d 1437 (10th Cir.1996), we held that an airline mechanic whose impaired vision prevented him from taxiing aircraft was not disabled under the ADA because he was only disqualified from "a single, particular job." Id. at 1445; see also Bolton v. Scrivner, Inc., 36 F.3d 939, 942 (10th Cir.1994) (stating that working "does not necessarily mean working at the job of one's choice"). By analogy, Mr. McGuinness must demonstrate that his anxiety impedes his performance in a wide variety of disciplines, not just chemistry and physics. This he has failed to do.

The court goes on to state:

> In the instant case, McGuinness has earned college degrees and pursued a career in the subjects that trigger his anxiety. While he experienced difficulties in his first-year of medical school, his poor performance did not require that he leave the program: He could have repeated the first year. As we held in Sutton, "it is the actual effect on the individual's life that is important in determining whether an individual is disabled under the ADA." Id. at 902. For the purposes of the ADA, inability to pursue one career, such as medicine, does not constitute a severe impact on an individual's life. See, e.g, Welsh v. City of Tulsa, 977 F.2d 1415, 1419 (10th Cir.1994) (holding that plaintiff was not disabled under the Rehabilitation Act, which defines "disability" the same way as the ADA, merely because he could not be a firefighter). (Tenth Circuit Opinion at 8-9, Appendix A at p. 11-XI; see Sutton v. United Airlines, Inc., 130 F.3d 893 (10th Cir. 1997).

The Tenth Circuit Court should never have performed an analysis regarding Dr. McGuinness' impairment in the major life activity of working given his claim that his impairment impacted him in the major life activity of concentrating and learning. This Court should grant certiorari in this case to elucidate this critical aspect of ADA litigation.

F. THIS COURT SHOULD GRANT CERTIORARI TO ESTABLISH THAT GRADING POLICIES WHICH SYSTEMATICALLY HANDICAP PERSONS WITH LEARNING DISABILITIES BASED UPON AN ARBITRARY STANDARD ARE ILLEGAL.

The term "discriminate" for purposes of Title I of the ADA, includes

> 3. utilizing standards, criteria, or methods of administration
>
> (A) that have the effect of discrimination on the basis of disability; or
>
> (B) that perpetuate the discrimination of others who are subject to common administrative control...42 U.S.C. §12112.

This Court should grant certiorari in this case to clearly establish that the use of a grading method which impermissibly disadvantages individuals with disabilities is illegal.

10. CONCLUSION

For the reasons stated, it is respectfully requested that this Court grant the petition on writ of certiorari.

Respectfully Submitted:

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APPENDIX

11. APPENDIX A: OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

[1998 WL 777070, 98 CJ C.A.R. 5662]

Unpublished Disposition

NOTICE: Although citation of unpublished opinions remains unfavored, unpublished opinions may now be cited if the opinion has persuasive value on a material issue, and a copy is attached to the citing document or, if cited in oral argument, copies are furnished to the Court and all parties. See General Order of November 29, 1993, suspending 10th Cir. Rule 36.3 until December 31, 1995, or further order.

NOTE: THIS OPINION WILL NOT BE PUBLISHED IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Kevin M. McGUINNESS,
Plaintiff-Appellant,

v.

UNIVERSITY OF NEW MEXICO SCHOOL OF MEDICINE,
Defendant-Appellee.

No. 97-2249.

United States Court of Appeals, Tenth Circuit.
Nov. 4, 1998.

PORFILIO, EBEL, and KELLY, JJ.
ORDER AND JUDGMENT [FN*]

FN* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.

KELLY.

*1 Plaintiff-Appellant Kevin M. McGuinness brought this action against the Defendant-Appellee, the University of New Mexico School of Medicine ("the medical school") for violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 ("the ADA"). The district court granted summary judgment for the medical school. On appeal, Mr. McGuinness argues that genuine issues of material fact exist on the following issues: (1) whether he suffers from a disability under the ADA, (2) whether he is entitled to a reasonable accommodation for such disability, (3) the degree of discretion built into the medical school's grading policy, (4) whether he

was employed by the medical school, and (5) whether the medical school discriminated against him, under 42 U.S.C. S 12112(b)(4), because of his association with his disabled son.

He also contends the district court erred in refusing to allow him to amend his complaint to include Rehabilitation Act and "association discrimination" claims. Finally, he argues that the court abused its discretion in failing to address 'serious misconduct" by defense counsel.

Our jurisdiction arises under 28 U.S.C. S 1291, and we affirm the district court's grant of summary judgment. Because we may treat new claims asserted in a plaintiff's response to a summary judgment motion as a motion to amend and review such claims de novo, we need not reach the issue of whether the district court improperly refused to let Mr. McGuinness amend his complaint. Finally, we hold that the magistrate judge did not abuse his discretion in choosing not to impose sanctions on the Defendant.

Background

When Mr. McGuiness entered the University of New Mexico Medical School in 1992, he had a bachelor of science degree in chemistry and biology, a degree in physiological psychology, and a doctorate in psychology. He had worked as a forensic chemist, and he continued to work as a clinical psychologist during medical school. Mr.

McGuinness experienced anxiety in chemistry and mathematics courses in both graduate and undergraduate school but developed study habits that allowed him to overcome his difficulties.

At the beginning of each medical school class, the professors explained the school's written grading policy, which included consideration of natural breaks or clusters in the students' performance, as well as each student's numerical average. During his basic biochemistry course in medical school, Mr. McGuinness informed the professor of his anxiety but indicated that he needed no test- taking accommodations. See Aplt.App. at 489, 491. He requested only that the professor set clear grading standards for the course and not regard him as lazy. See Aplt.App. at 491. The professor recommended that he see a clinical psychologist on the medical school faculty.

At the end of the basic biochemistry course, Mr. McGuinness learned that he had received a grade of "marginal," even though his numerical average exceeded seventy percent, which he believed merited a "satisfactory" grade. According to the medical school's grading policy, students who receive "marginal" grades in more than fifteen percent of their first-year courses must repeat the first year or leave the program. When Mr. McGuinness earned another "marginal" grade in cardiovascular pulmonary physiology, more than fifteen percent of his first- year grades were "marginal." He was offered but refused the

opportunity to take makeup exams in biochemistry, and, after three makeup tests in the cardiovascular/pulmonary block, he still did not obtain a "satisfactory" grade. Mr. McGuinness chose not to repeat the first-year curriculum. Instead, he filed suit against the University of New Mexico Medical School.

*2 In his complaint, Mr. McGuinness attempted to assert a claim under the ADA but failed to distinguish between Title I and Title II; neither did he raise a claim under the statute's "association discrimination" provision, 42 U.S.C. S 12112(b)(4). Whereas Title I proscribes discrimination against employees or prospective employees because of their disabilities, see 42 U.S.C. §§ 12111-12112, Title II bars public entities from discriminating on the basis of disability in the provision of programs and benefits. See 42 U.S.C. §§ 12131-12132. In his response to the medical school's motion for summary judgement, Mr. McGuinness attempted to (1) separate his Title I and Title II claims, (2) add a claim under the Rehabilitation Act of 1973, and (3) assert an "association discrimination" claim under the ADA. See Aplt.App. at 374-76, 380-82. He subsequently filed a motion to extend case management deadlines that included an informal request for leave to amend his complaint. See Aplt.App. at 203-06. The district court denied this motion. See Aplt.App. at 164-65.

The district court granted summary judgment for the medical school on the ground that Mr. McGuinness was not disabled within the meaning of the ADA. Although Mr. McGuinness was not allowed to amend his complaint, the district court nevertheless ruled on the "association discrimination" claim. See Aplt.App. at 25-26. It held that Mr. McGuinness did not offer facts sufficient to support a cause of action under §12112(b)(4) because he was neither employed by the medical school, nor did he show that the medical school discriminated against him because of his association with his disabled son.

See id. The district court did not rule on Mr. McGuinness' Rehabilitation Act claim.

Discussion

A. ADA Claims

We review a grant of summary judgment de novo. See Den Hartog v. Wasatch Academy, 129 F.3d 1076, 1081 (10th Cir.1997). Under Fed.R.Civ.P. 56(c), we must determine whether a genuine issue of material fact is in dispute and, if not, whether the district court correctly applied the substantive law. Id. at 1081.

The parties agree that Mr. McGuinness has an "anxiety disorder" that manifests itself when he takes chemistry and mathematics tests. The district court correctly held that such a disorder,

limited to certain academic subjects, does not constitute a disability under the ADA. On appeal, we treat the Title I and Title II claims separately, even though they did not appear in this manner in the complaint, because Mr. McGuinness raised them both in his response to the medical school's motion for summary judgment. See Viernow v. Euripides Dev. Corp., 157 F.3d 785, 1998 WL 677759, at *13 n. 9 (10th Cir.1998) (citing Evans v. McDonald's Corp., 936 F.2d 1087, 1090-91 (10th Cir.1991)) (new claims raised in plaintiff's opposition to summary judgment treated as a motion to amend the complaint).

*3 According to Title II of the ADA, "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. §12132. Under Title II, the plaintiff does not have to be an employee of the defendant. See, e.g., McPherson v. Michigan High School Athletic Assoc., 119 F.3d 453, 459 (6th Cir.1996) (reviewing a Title II claim by a student-athlete against a high school sports program). However, Mr. McGuinness' Title II claim fails because he has not shown that he has a disability within the meaning of the ADA.

Under Title II, a "qualified individual" is someone with a disability who "with or without reasonable modifications ... meets the essential eligibility

requirements" to receive public services or participate in a public program. 42 U.S.C. §12131(2). The term "disability" means "a physical or mental impairment that substantially limits one or more of the major life activities" of the individual. 42 U.S.C. §12102(2)(A). According to the Supreme Court, an impairment need not appear on a specific list of disorders to constitute a "disability." See Bragdon v. Abbott, — U.S. —, —, 118 S.Ct. 2196, 2202, 141 L.Ed.2d 540 (1998). Nor must it affect those aspects of a person's life that have a public or economic character. See id. at 2205. Indeed, in the case of physical impairment like HIV infection, a disability can be latent and asymptomatic. See id. at 2204. However, the plain meaning of the word "major" requires that the activity be significant, in order to be covered by the ADA. See id.

Because the ADA does not define the phrases "substantially limits" or "major life activity," this circuit has looked to the EEOC regulations to construe the statute's meaning. *See* Sutton v. United Airlines, 130 F.3d 893, 900 (10th Cir.1997). The regulations illustrate the meaning of "major life activity" with such examples as "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." §29 C.F.R. § 1630.2(i); see also Sutton, 130 F.3d at 900 (following the regulations' definition of "major life activity"). We assess three factors to determine whether an individual is "substantially limited" in a major life

activity: (1) the nature and severity of the impairment, (2) the duration or expected duration of the impairment, and (3) the permanent or expected long-term impact of the impairment. See Sutton, 130 F.3d at 900 (citing 29 C.F.R §1630.2(j)(2)).

Mr. McGuinness contends that his anxiety impairs his "academic functioning," not his ability to work, and that the regulations' definition of substantial limitations on "working" should not control the outcome of this case. However, the deciding principles of employment discrimination cases can be applied to ADA claims in the educational context. See McPherson, 119 F.3d at 460. In employment cases, we have held that an individual does not suffer a disability under the ADA if his disability does not prevent him from performing "a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." Siemon v. AT & T Corp., 117 F.3d 1173, 1176 (10th Cir.1997) (quoting 29 C.F.R. § 1630.2(j)(3)(1). For example, in MacDonald v. Delta Airlines, Inc., 94 F.3d 1437 (10th Cir.1996), we held that an airline mechanic whose impaired vision prevented him from taxiing aircraft was not disabled under the ADA because he was only disqualified from "a single, particular job." Id. at 1445; see also Bolton v. Scrivner, Inc., 36 F.3d 939, 942 (10th Cir.1994) (stating that working "does not necessarily mean working at the job of one's choice"). By analogy, Mr.

McGuinness must demonstrate that his anxiety impedes his performance in a wide variety of disciplines, not just chemistry and physics. This he has failed to do.

*4 Moreover, Mr. McGuinness admits that, in the past, he has been able to mitigate his anxiety in chemistry and math by altering his study habits. See Aplt. App. at 19-20. Under the law of this circuit, we must consider the plaintiff's ability to mitigate his impairment in determining if that impairment substantially limits a major life activity. See Sutton, 130 F.3d at 902-3. Just as eyeglasses correct impaired vision, so that it does not constitute a disability under the ADA, an adjusted study regimen can mitigate the effects of test anxiety. See id. at 903.

In the instant case, McGuinness has earned college degrees and pursued a career in the subjects that trigger his anxiety. While he experienced difficulties in his first-year of medical school, his poor performance did not require that he leave the program: He could have repeated the first year. As we held in Sutton, "it is the actual effect on the individual's life that is important in determining whether an individual is disabled under the ADA." Id. at 902. For the purposes of the ADA, inability to pursue one career, such as medicine, does not constitute a severe impact on an individual's life. See, e.g. Welsh v. City of Tulsa, 977 F.2d 1415, 1419 (10th Cir.1994) (holding that plaintiff was not disabled under the

Rehabilitation Act, which defines "disability" the same way as the ADA, merely because he could not be a firefighter).

Even if Mr. McGuinness had shown a disability under the ADA, he could not demand an unreasonable accommodation from the medical school. See, e.g., Milton v. Scrivner, Inc., 53 F.3d 1118, 1124 (10th Cir.1995). Educational institutions are accorded deference with regard to the level of competency needed for an academic degree. See Doherty v. Southern College of Optometry, 862 F.2d 570, 575 (6th Cir.1988)(discussing reasonable accommodations under the Rehabilitation Act). Requiring the University of New Mexico to advance Mr. McGuinness to the next level of the medical school program would represent a substantial, rather than a reasonable accommodation. See id. (holding that an education institution is not required to waive a course requirement deemed reasonably necessary for the conferral of an academic degree). For the foregoing reasons, summary judgment for the medical school is appropriate on Mr. McGuinness' Title II claim.

Because we may treat new issues raised in a plaintiff's response to a summary judgment motion as a request to amend, we also review Mr. McGuinness' §12112(b)(4) "association discrimination" claim. See Viernow, 157 F.3d 785, 1998 WL 677759, *13 n. 9. The district court held that Mr. McGuinness did not state a valid cause of

action under the ADA's "association discrimination" provision, §12112(b)(4), even though it refused to allow him to amend his complaint to include this claim. See Aplt.App. at 25-26, 164-65. Although we note that the district court's procedure was inconsistent, we agree that Mr. McGuinness did not satisfy the basic elements of an "association discrimination" claim.

*5 Because the "association discrimination" provision falls under Title I of the ADA, the plaintiff must show an employment relationship with the defendant. See Den Hartog, 129 F.3d at 1081-82. To state a claim under Title I of the ADA, the defendant must be "an employer, employment agency, labor organization, or joint labor-management committee" that employs the plaintiff. 42 U.S.C. §12111(2),(4). Mr. McGuinness has failed to show the existence of such an employment relationship between himself and the medical school. Unless a student receives remuneration for the work he performs, he is not considered an employee. See O'Connor v. Davis, 126 F.3d 112, 116 (2d Cir.1997), cert. denied, — U.S. —, 118 S.Ct. 1048, 140 L.Ed.2d 112 (1998). Nor are medical students, as opposed to medical interns or residents, considered "student employees" of the government. See 5 U.S.C. §5351(2).

The fact that Mr. McGuinness completed federal employment applications, took a federal oath of office, and was covered by the New Mexico Tort

Claims Act, see Aplt. Br. at 39, does not make him an employee of a state-run medical school. An organization, such as a university, may confer certain benefits on an individual and exercise a modicum of control over him without establishing a master-servant relationship. See Graves v. Women's Prof'l Rodeo Ass'n, 907 F.2d 71, 72-73 (8th Cir.1990). Thus, as a threshold matter, Mr. McGuinness failed to establish the employment element of his Title I claim.

Neither did Mr. McGuinness satisfy the discrimination element of §12112(b)(4). He presented evidence that the school knew he had a child with cerebral palsy, but not that such awareness was a "determining factor" in the decision to make him repeat the first-year program. See Den Hartog, 129 F.3d at 1085 (setting forth the elements of a claim under § 12112(b)(4)); Rogers v. Int'l Marine Terminals, 87 F.3d 755, 760-61 (5th Cir.1996) (affirming summary judgment where plaintiff failed to show that he was terminated because of a relative's disability). Thus, we hold that the medical school is entitled to summary judgment on the "association discrimination" claim as well.

B. Rehabilitation Act Claim

Mr. McGuinness' cause of action under the Rehabilitation Act, 29 U.S.C. §794, contains the same flaw as his ADA claims: He has not shown that he suffers from a disability covered by the

statute. The Rehabilitation Act proscribes discrimination against disabled persons who are otherwise qualified for participation in programs receiving federal funding, including public universities. See 29 U.S.C. § 794(a), (b)(2)(A). The statute defines "disability" in the same way as the ADA. See Bragdon v. Abbott, — U.S. —, —, 118 S.Ct. 2196, 2202, 141 L.Ed.2d 540 (1998); Siemon v. AT & T Corp., 117 F.3d 1173, 1176 (10th Cir.1997).

*6 An impairment limited to specific stressful situations, such as the mathematics and chemistry exams which trigger Mr. McGuinness' anxiety, is not a disability under the Rehabilitation Act. See, e.g., Gonzagowski v. Widnall, 115 F.3d 744, 746-47 (10th Cir.1997). Nor is granting the plaintiff a passing grade a reasonable accommodation if university officials believe that he has not demonstrated competency in subject matter necessary for a medical degree. See Doherty v. Southern College of Optometry, 862 F.2d 570, 575 (6th Cir.1998).

C. Failure to Sanction Defendant

Under the authorization of the district court, a United States magistrate judge sanctioned the plaintiff for violating a court order and Rule 16-402 of the Rules of Professional Responsibility. See Aplt.App. at 5-11. Mr. McGuinness does not appeal this decision. Rather, he asserts that the district court should have addressed misconduct

by defense counsel. He contends that, by lodging a complaint with the magistrate judge, defense counsel chilled the flow of information necessary for Mr. McGuinness' case and thus improperly wielded the Rules of Professional Conduct as a tactical weapon.

We review decisions to impose sanctions for abuse of discretion and note that the "[d]etermination of the correct sanction for a discovery violation is a fact-specific inquiry that the district court is best qualified to make." Ehrenhaus v. Reynolds, 965 F.2d 916, 920 (10th Cir.1992). Here, the magistrate judge decided that plaintiff's counsel improperly obtained an affidavit from an emeritus professor who was the full-time assistant dean of student affairs at the medical school and a member of the steering committee that made decisions regarding Mr. McGuinness' status. See Aplt.App. at 279. Plaintiff's counsel violated a protective order barring him from ex parte contact with this individual. See Aplt.App. at 86. The magistrate judge did not abuse his discretion in imposing the sanction, nor does the record reflect that he overlooked misconduct by the defendant. Mr. McGuinness' argument is without merit.

AFFIRMED.

C.A.10 (N.M.),1998.

McGuinness v. University of New Mexico School of Medicine

12. APPENDIX B: OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

KEVIN McGUINNESS,

Plaintiff,

vs. NO. CIV 95-1434
MV/LFG

UNIVERSITY OF NEW MEXICO SCHOOL OF MEDICINE,

Defendant.

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Defendant's Motion for Summary Judgment [#27], filed August 26, 1996 and Plaintiff's Counter-Motion for Summary Judgment, [#40] filed September 16, 1996.

Plaintiff's Complaint seeks compensatory and punitive damages and reinstatement in the

University of New Mexico School of Medicine as a full-time second-year medical student. The Complaint is based solely on alleged violations of the Americans with Disabilities Act, 42 U.S.C. Section 12101 *et seq.* (the "ADA"). Both Plaintiff and Defendant agree that there are no genuine issues of material fact that would preclude summary judgment.

Undisputed facts- Plaintiff has a bachelor of science degree in chemistry and biology, a degree in physiological psychology, and a doctoral degree in clinical psychology Although Plaintiff experienced some difficulty in achieving success in chemistry and math in undergraduate school and self-diagnosed his problem as test anxiety disorder in graduate school, he "developed techniques for overcoming the obstacles within the academic program that focuses on understanding the academic'-requirements before [he] started the course and developing study habits to allow me to achieve the standard, just like everybody else in the class." [Def. :Ex. 6] He worked for over five years as a chemist and has been working as a clinical psychologist while enrolled in medical school. Plaintiff was admitted to medical school in 1992. The professors explained the written grading policy to the students at the beginning of each course. This policy is as follows:

> 'The final grade for the block will be determined entirely by the combined

> scores received on the four examinations together with points received for the case study tutorials. It is expected that overall averages of about 90%, 80% and 70% will correspond to block grades of OUTSTANDING, GOOD, AND SATISFACTORY, respectively. An overall average below 65% will almost certainly be UNSATISFACTORY. **Averages above 65%** will be evaluated in detail to determine if the student is to receive a grade of MARGINAL or SATISFACTORY. (Emphasis added.)

The word "about" in the above policy provided for discretion and. flexibility in awarding grades, and the professors based their decision on whether to award a grade of "marginal" or "satisfactory" on two other factors besides the overall averages: "natural breaks or clusters" apparent in student performance levels during the particular semester, and the individual student's score on the final, comprehensive examination. Plaintiff alleges that by reading the grading policy, he ascertained that there would be no "curve" built into the grading system for the biochemistry block except for the evaluation between "marginal" and "unsatisfactory" grades. His complaint centers on the fact that these other two factors were considered when his final average in biochemistry was 70%.

During his first course in biochemistry, Plaintiff approached one of his professors, Dr. Reyes, and told him about his test anxiety and his difficulty in demonstrating on exams what he had learned. He told Dr. Reyes that he needed for Dr. Reyes not to "deviate from their grading policy ... and [asked] that [he] not be labeled as lazy by Dr. Reyes, because [he] would not be able to perform at the same level on his course tests as [he] was able to on all of the other tests." [Def. Ex. 6] Plaintiff indicated to Dr. Reyes that he "needed no accommodation for test-taking." [Def. Ex. 6] Plaintiffs scores on his first three exams were 70%, 70%, and 66%. He scored an 84% on his tutorial and 69% on the final exam. His overall average was 70%. Because the lowest average above Plaintiff's was a 73.5 % and that student had made a 77 % on the final exam, and two other students had averages of 69% and 70%, Plaintiff's average represented the top score of a "natural break or cluster" between "satisfactory" and "marginal". Because his grade on the final exam was only "marginal", the biochemistry professors unanimously agreed that Plaintiff should be awarded a "marginal" grade. It is uncontroverted that Plaintiff was given the option of retaking the biochemistry final exam, but he refused to do so, arguing that his average of 70% conclusively established that he had the right to receive a "satisfactory" grade.

In order to be promoted to the second-year of medical school, students had to obtain at least a "satisfactory" grade in either the cardiovascular/pulmonary or biochemistry block. Plaintiff initially received an "unsatisfactory" grade in the cardiovascular/pulmonary block the semester after he took biochemistry, but after taking three make-up exams, was finally awarded a "marginal" score for that block. Because he had not met the requirement of receiving a "satisfactory" grade in one of the two blocks and refused to take a make-up in biochemistry, the medical school gave Plaintiff the option of applying to repeat the first-year courses or being dismissed from medical school. Plaintiff chose not to apply to repeat the courses and filed suit.

Plaintiff is not disabled for purposes of the ADA. Section 12132 of the ADA provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. "

The term 'disability' means, with respect to an individual–(A) a physical or mental impairment that substantially limits one or more of the major

life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment. 42 U.S.C.§ 12102(2). Courts have held that this language indicates that there must be a substantial limitation on a major life activity, and that the impairment must be significant. Forrisi v. Bowen, 794 F.2d 931, 933-34 (4th Cir. 1986). Impairments that are minor and whose relative severity is widely shared do not fall within the statute's definition. Id- at 934. Regulations of the Equal Employment Opportunity Commission have been issued to implement the ADA. See 29 C. F.R. Pt. 1630; Bolton v. Scrivner, 36 F. 3d 939, 942 (10th Cir. 1994). cert denied, 115 S. Ct. 1104 (1995). Further, "[t]he legislative history of the ADA indicates that 'Congress intended that the relevant caselaw developed under the Rehabilitation Act be generally applicable to the term 'disability' as used in the ADA.'" Id- at 943 (citations omitted). The EEOC has defined "major life activities" to include "functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. §1613.702(C). Under the EEOC regulations, to demonstrate that an impairment "substantially limits" the major life activity of working, for example, an individual must show "significant[restrict[ion] in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." Id., §1630.2(3)(i). "The inability to

perform a single, particular job does not constitute a substantial limitation in the major life activity of working." Id.

Plaintiff asserts that he qualifies for protection under the ADA because he suffers from a test anxiety disorder related to learning in the specific subject areas of chemistry and mathematics that substantially limits a major life activity. This "major life activity" is rather hazily defined by Plaintiff in his response to the motion for summary judgment as an ability to demonstrate his competence in these subject areas in examination settings. Three factors that should be considered when determining whether an impairment substantially limits a major life activity are: "(i) [t]he nature and severity of the impairment; (ii) [t]he duration or expected duration of the impairment; and (iii) [t]he permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment. " Id., §1630.20(2). Plaintiff's "impairment" of feeling test anxiety in two discrete subject matters that do not require special accommodations in testing situations is neither significant nor severe. Plaintiff has demonstrated that he can overcome this "impairment" simply by studying harder and longer than other individuals have to. Although it is probable that his problem with test anxiety in chemistry and math will be life-long, there has been no permanent 'impact resulting from the impairment that has prevented him from getting a degree in chemistry and psychology or from

obtaining extremely profitable employment. See Plaintiff's First Supplemental Initial Disclosures, attached as Def's Ex 2; see also Welsh v. City of Tulsa, 977 F.2d 1415, 1417 (10th Cir. 1992) ("While the [Rehabilitation Act] regulations define a major life activity to include working, this does not necessarily mean working at the job of one's choice."); Jasany v. United States Postal Serv. 755 F.2d 1244, 1248 (6th Cir. 1985) (stating that an impairment that interferes with an individual's ability to do a particular job but does not significantly decrease that individual's ability to obtain satisfactory employment otherwise is not substantially limiting within the meaning of the statute). Under Plaintiff's asserted facts. had he simply known that he needed to pass his final exam with at least a 70 or 71 score and obtain at least a 72 or 73 as a final average, he could have done so without special accommodation from the medical school; thus it is clear that his "impairment" does not permanently or significantly impact any major life activity. Plaintiff's inability to pass a specific type of exam absent an awareness of the exact score that he had to obtain in order to pass is not a substantial limitation to a major life activity.

Contrary to Plaintiff's assertions, In Re Petition of Rubenstein, 637 A. 2d 113 1 (Del. 1994), is not on point. There, the plaintiff was diagnosed with a learning disability that required accommodations, id- at 1137, not with a condition that only manifests itself under particular

circumstances and has an impact that can be diminished without accommodation.

"The burden is on the plaintiff to establish the existence of an impairment that substantially limits a major life activity as an element of the plaintiff's prima facie case. If the plaintiff fails to establish a prima facie case, it is unnecessary to address the question of reasonable accommodation." Jasany, 755 F.2d at 124~1-50. Plaintiff has failed to establish-'the existence of an impairment that substantially limits a major life activity, thus the Court need -' not address the question of accommodation. The Court notes, however, that it is undisputed that Plaintiff never requested an accommodation before he took any exam and in fact declined the professors' offers of extended time for test taking. This fact further distinguishes Rubenstein, supra_because in that case the plaintiff had requested additional time before taking an exam but was refused the accommodation. 637 A.2d at 1133.

Plaintiff has not stated facts to support a cause, of action under 42 U.S.C. 12112(b)(4). Plaintiff alleges that the Medical School denied him the accommodation of changing his biochemistry grade to "satisfactory" because his son has cerebral palsy, claiming protection under Section 12112(b)(4). That section, however, relates specifically to employment discrimination and is not applicable to general denial of benefits or programs cases. Although Plaintiff claims that

he had to carry malpractice insurance and take the federal employee's oath, he is not an "employee" of the Medical School such that he may claim protection under this Section and his complaint does not pertain to any aspect of employment. Even if he could claim such status, Plaintiff points only to a letter that he sent to one of his, biochemistry professors informing him that he had a son with cerebral palsy and the fact that one of the members of the steering committee knew this fact as evidence of that claim. The letter was sent after the professors had unanimously decided not to change their initial assessment of Plaintiffs performance; there is absolutely no evidence that any of the professors who determined Plaintiff's final grade knew that he had a son with cerebral palsy before that time, much less that they considered that fact when determining his grade. Further, Plaintiff has failed to present evidence that he has been denied the opportunity to continue his medical school training. The medical school offered him an opportunity to retake the biochemistry exam and allowed extra time for him to do so, but he refused. After his refusal, it allowed him to apply to retake the course; it was his choice to refuse these opportunities and discontinue his medical training.

THEREFORE,

IT IS ORDERED that Defendant's Motion for Summary Judgment is **GRANTED**;

Plaintiff's Cross-Motion for Summary Judgment is **DENIED**; and Plaintiffs complaint is hereby **DISMISSED** with prejudice.

MARTHA VAZQUEZ
U.S. DISTRICT COURT
JUDGE

13. APPENDIX C: FINDING OF THE UNITED STATES DEPARTMENT OF EDUCATION THAT PETITIONER HAD BEEN DISCRIMINATED AGAINST BY THE UNIVERSITY OF NEW MEXICO

DEPARTMENT of EDUCATION

AUG 19 1994

Re: **08942026**

Dr. Kevin McGuinness
5903 Aspen Avenue, N.E.
Albuquerque, New Mexico 87110

Dear Dr. McGuinness:

This letter is to notify you of the determination of the U. S. Department of Education, Office for Civil Rights (OCR) regarding the resolution of the above-referenced complaint. You alleged that the University of New Mexico (UNM) discriminated against you in violation of Section 504 of the Rehabilitation Act of 1973 (Section 504), 29 U.S.C. §794, and its implementing regulation at 34 Code of Federal. Regulations (C.F.R.), Part 104; and Title II of the Americans with Disabilities Act of 1990 (Title 11), 42 U.S.C. §§12131-12161, and its implementing regulation at 28 C.F.R., Part 35, which prohibit discrimination on the basis of disability in any program or activity receiving

Federal financial assistance from the U.S. Department of Education. The District receives Federal financial assistance and is, therefore, subject to the requirements of Section 504 and Title II.

In particular, you alleged that UNM discriminated against you on the basis of disability by

1. Refusing to provide you a requested academic adjustment for Basic Biochemistry;

2. Awarding you a lower grade in Basic Biochemistry than you had earned; and

3. Refusing to consider your complaint made with UNM's Equal Opportunity Programs (EOP).

In reaching a determination on this complaint, OCR reviewed records and documents pertinent to the issues in the complaint. OCR also conducted interviews with you, UNM faculty and staff I and other individuals named by you or UNM. As a result of our investigation, OCR has made the following determinations of fact:

ISSUES ONE & TWO: ACADEMIC ADJUSTMENT & GRADING

- In August 1992, you enrolled in UNM's School of Medicine. You took Biochemistry during the fall of 1992. You have an anxiety disorder which, according to a clinical psychologist, is a disorder that substantially limits your ability to learn and achieve academically. Therefore, OCR concluded that you are a student with a disability who is qualified under Section 504 and Title II.

- UNM has policies and procedures which address provision of special services to students with disabilities which are published in booklets available to staff, faculty and students. UNM's student handbook, Pathfinder, refers students to the appropriate publication for more information on obtaining special services.

- The student must request consideration for eligibility as a student with a disability before the student can be qualified to receive accommodation (including academic adjustments). Eligibility as a student with a learning" disability is determined by UNM's Educational Diagnostic Unit.

- UNM's Educational Diagnostic Unit prepares a memo summarizing the student's learning difficulties and offering general suggestions for

helping the student in the classroom. It is the student's responsibility to present the memo to the instructor early in the semester.

- Medical students also receive a publication entitled "Counseling Pathfinder," which provides information on services available through UNM's Student Health Center. In addition, the School of Medicine has a clinical psychologist, the Director of Biomedical Communications, who counsels students on learning disabilities and test anxiety.

- According to witness testimony and affidavits, School of Medicine faculty were not aware of your disability prior to your assignment of a marginal grade in biochemistry.

- According to witness testimony and affidavits, you did not request an academic adjustment (modification to make-up exam format or change in marginal grade) to accommodate your disability. You did not make such a request unofficially of School of Medicine faculty, or officially through Disabled Student Services.

- According to you, correspondence written by you and your attorney (during the Steering Committee's consideration of your grievance), witness testimony and affidavits, you did contest your marginal grade bef ore the School of Medicine Steering Committee I, pursuant to the "UNM Student Standards and Grievance

Procedure," as a grading policy issue. Your disability was not raised as an issue in that grievance.

- School of Medicine personnel, including Steering Committee I members, provided you with modifications in examination formats on three make-up exam opportunities afforded you in a separate course, Cardiovascular/Pulmonary I, in which you initially received a grade of unsatisfactory. School of Medicine policy on promotion as published in the student handbook requires that a student receiving a grade of unsatisfactory or marginal must be provided at least one and a maximum of two opportunities for makeup. Modifications were provided even though no request was made for an academic adjustment needed because of a disability.

The regulation implementing Title II at 28 C.F.R. S 35.130 provides that UNM shall not discriminate against a qualified individual with a disability, or provide such an individual with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result as the aid, benefit, or service provided to others. UNM must also make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless UNM can demonstrate that making the modifications would fundamentally

alter the nature of the service, program, or activity.

Section 504 at 34 C.F.R. §§ 104.43(a) and 104.44(a) provides that UNM shall not subject qualified students with disabilities to discrimination under any academic programs to which Section 504 applies. Further, UNM shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate on the basis of disability against qualified individuals with disabilities. Academic requirements that UNM can demonstrate are essential to the program of instruction being pursued will not be regarded as discriminatory within the meaning of Section 504.

Conclusion:

OCR concluded that there is insufficient evidence to support your allegations that you were assigned a lower grade than you earned in Basic Biochemistry because of your disability, and that you were denied academic adjustment for your disability. There is no evidence that UNM personnel were aware of your disability prior to assignment of your Basic Biochemistry grade. There is no evidence that you ever requested any academic adjustment, either formally or informally, to accommodate your disability. Therefore, OCR has determined that the evidence is insufficient to support a finding of a violation of Section 504 or Title II in this regard.

ISSUE THREE: GRIEVANCE PROCEDURE,

- UNM has adopted a procedure entitled "Discrimination Complaint Procedure, 11 signed by President Richard Peck on April 29, 1993, that provides for prompt and equitable resolution of complaints alleging violations of Section 504 and Title II.

- Under Article 3. Formal Action, 3.4 Jurisdiction, Section 3. 4. 1, 11 [Equal Opportunity Programs (EOP)] wi 11 determine through processing the intake form(s) whether this Discrimination Complaint, Procedure is applicable; if not, EOP shall refer the complainant to the appropriate University process, if any." There are no time frames for completion of review of the intake form.

- Article 3. Formal Action, Section 3.5 Preliminary Resolution Process for Academic Disputes, provides:

  If the complainant is a student and the complaint alleges that he or she has been discriminated against or sexually harassed in connection with academic evaluation, including . . . grades, . . . the preliminary resolution process set forth in this section shall be followed unless the respondent is willing to sign a statement expressly waiving this process.

The process described in the section provides that if resolution is not achieved at the preliminary stage, the complainant may initiate further processing of the complaint as described in subsequent sections of the procedure.

- Under Article 3. Formal Action, the complaint may be resolved through settlement/conciliation efforts (prior to investigation), or investigation to include a formal memorandum of findings, issuance of a report prepared by EOP, and attempts to negotiate a conciliation agreement (when the report concludes that discrimination/ sexual harassment occurred) . If no conciliation is accomplished or attempted, notice is provided to both parties of their right to continue the formal action, along with an explanation of the appeal procedures. Appropriate time frames are incorporated throughout Article 3. Formal Action.

- UNM's procedures include appropriate due process provisions, including appeal of EOP's jurisdiction decision as provided under Section 3.4.3. Following an appeal by either party, jurisdiction is decided by the Vice President for Academic Affairs, the Vice President for Student Affairs, and the Director of Human Resources. The University Counsel (or designee) participates as a nonvoting member.

- On November 1, 1993, you completed an Intake Questionnaire and returned it to the University's Equal Opportunity Programs (EOP) alleging discrimination on the basis of disability. EOP determined that it lacked jurisdiction over your grievance concluding that your allegation focused on a grading dispute only, and not on alleged discrimination on the basis of disability. The first notice of this determination was provided to you in writing in a memorandum dated November 16, 1993.

- As requested in a telephone conversation with EOP on November 19, 1993, at 9:43 a.m., you submitted additional information on December 6, 1993, to clarify your allegations. Materials submitted included a copy of the complaint filed with OCR and a "Title II of the Americans with Disabilities Act/Section 504 of the Rehabilitation Act of 1973 Discrimination complaint Form" filed with the U.S. Department of Justice.

- EOP officials stated that information submitted by you did not indicate that you were making a discrimination complaint based on disability. Specifically, they deny that you indicated to them, either through the materials submitted or conversations, that you felt that you were assigned a lower grade than you earned because of your disability.

- Records of a telephone conversation with you on November 19, 1994, at 9:43 a.m. state "no problems until he told professor about his disability."

- Materials submitted to EOP by you on December 6, 1993, state:

  Despite earning a final average of 70.4% I was assigned a grade of Marginal . . . Despite a request (when I was told my final average was 69% or less) for a reasonable accommodation such as an appropriate alternative to the traditional examination process, I was refused . . . While I originally thought the Marginal grade was a benign error, the actions of the Dean, Assistant Dean for Undergraduate Education, the Steering Committee, the Department Chair, and the course Professor strongly suggest a pattern of intentional prejudicial discrimination which is severely harmful.

- EOP's Intake Assessment form dated December 7, 1993, states:

(KM's) allegations of discrimination are directly connected to the grading method. He states that his combined scores for the biochemistry course are 70.4%, which correlates to an overall grade of SATISFACTORY. However, the professor allegedly failed to combine/average his scores (because of his disability) and instead compared each of his individual scores to the remainder of

the class and then assigned him an overall score of 69% or less ([School of Medicine (SOM)] refuses to tell him his precise score). Even if we accept a complaint from the student, I don't see how we can extract the information necessary to prove how the scores were calculated. Even if we do, how do we establish a connection between the scoring method and his disability. He advised the professor of his disability, but he never requested any accommodations (of any kind).

- According to UNM's Discrimination Complaint Procedures (Section 3.5) students' complaints alleging discrimination or sexual harassment in connection with academic evaluation, including grades, should be processed under the preliminary resolution procedure. If preliminary resolution is unsuccessful, further processing of the complaint is provided as described in subsequent sections which provide for investigation, preparation of a memorandum of findings, and issuance of a report by EOP.

- Your grievance was not accepted by EOP at the intake stage after three submissions of information by you because EOP determined that it lacked jurisdiction. No investigation was conducted, and you were not afforded an appeal of the decision.

- The Discrimination Complaint Procedure provides appeal of EOP's jurisdiction decision if a party challenges the decision. In such a

case, jurisdiction is decided by the Vice President for Academic Affairs, the Vice President for Student Affairs, and the Director of Human Resources; the University Counsel (or designee) participates as a nonvoting member.

The regulations implementing Title II at 28 C.F.R. § 35.107(a) and (b), and section 504 at 34 C.F.R. §104.7(a) and (b), provide that UNM designate at least one employee to coordinate its efforts to comply with the requirements of the regulations. In addition, UNM must adopt and publish grievance procedures that incorporate appropriate due process standards, and that provide for prompt and equitable resolution of complaints alleging violation of the regulations.

Conclusion:

OCR found that UNM has adopted grievance procedures that provide for prompt equitable resolution of complaints alleging violations of Section 504 and Title II, but UNM did not follow its procedures in handling your complaint. UNM's EOP office decided that it lacked jurisdiction over your complaint because it raised an academic dispute over a grading issue. However, OCR concluded that EOP had sufficient information to infer that you were complaining of discrimination on the basis of disability.

Specifically, EOP should have been able to deduce that you were alleging that you had been assigned a lower grade than you earned because of your disability. Further, records of a telephone conversation with you on November 19, 1993, and an intake assessment form completed on December 7, 1993, and reviewed on December 8, 1993, indicate that EOP personnel were drawing such a conclusion. Additionally, while comments on the intake form reflect a basic understanding of your allegation, the comments also indicate that your complaint was rejected because the investigation necessary to prove your allegation would have been too difficult to conduct.

UNM's procedures provide that if a complaint includes allegations that a student has been discriminated against in connection with academic evaluation, including grading, the Discrimination Complaint Procedure at Section 3.5, and the following sections, are to be applied. OCR also found that you were not afforded the right to appeal EOP's jurisdiction decision as provided by the Discrimination Complaint Procedure. Consequently, OCR finds that UNM discriminated against you on the basis of disability by refusing to consider your discrimination complaint made with UNM's Equal opportunity Programs (EOP), and for failing to provide you with an appeal of EOP's jurisdiction decision. Therefore, UNM is in violation of 34 C.F.R. § 104.7(b) . To address the cited violation, UNM has agreed to undertake the actions stipulated in the attached Agreement for

Corrective Action. Implementation of the Agreement will be monitored by OCR.

We are closing this case effective the date of this letter. This letter addresses only the issues discussed above and should not be interpreted as a determination of UNM's compliance or noncompliance with Section 504 or Title II in any other respect.

If you have any questions regarding the disposition of your case, please submit them to this Office in writing within 30 days of receipt of this letter. Please reference the case docket number in your correspondence.

Sincerely,

Linda Howard-Kurent
Branch Chief-B
Compliance Enforcement Division I

Enclosure: Agreement for Corrective Action

Supreme Court, U.S.
FILED
MAR 5 1999
CLERK

No. 98-1241

In The

Supreme Court of the United States

October Term, 1998

KEVIN M. McGUINNESS,

Petitioner,

v.

UNIVERSITY OF NEW MEXICO
SCHOOL OF MEDICINE,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The case described and argued by Petitioner in the Petition For Writ Of Certiorari misrepresents the case and facts presented to the Tenth Circuit Court of Appeals and the United States District Court for the District of New Mexico. Petitioner was admitted to the University of New Mexico School of Medicine in 1992. Prior to his admission, he obtained a Bachelor of Science degree in chemistry and biology, a degree in physiological psychology, and a doctorate in psychology. He had worked as a forensic chemist for the DEA, and he continued to work as a clinical psychologist during medical school. On November 27, 1995, Petitioner filed a verified complaint in the United States District Court for the District of New Mexico. In the complaint, Petitioner asserted a claim under the Americans with Disabilities Act (ADA) for denial of a reasonable accommodation. In his verified complaint he asserted that he suffered from "an anxiety disorder;" that he was "substantially limited in one major life activity;" that he "sought reasonable accommodation . . . in the context of test anxiety;" and that the Respondent failed to "make reasonable accommodation" for his known disability, all in violation of the Americans with Disabilities Act (ADA). He further asserted that he "achieved an acceptable final overall average" and "an acceptable passing grade" in the Basic Biochemistry Block. He then claimed that, despite having achieved a passing grade, he "received an overall grade of marginal" that was "contrary to the prevailing grading standards" and the award of that "marginal" grade prevented him from continuing his second year in medical school.

At the District Court level, Respondent moved for summary judgment. Petitioner attempted to add, via his response to the Respondent's motion for summary judgment and a combined counter-motion for summary judgment, two new claims: (1) one under the Rehabilitation Act of 1973 (29 U.S.C. § 701) and (2) another for "association discrimination" under the ADA (42 U.S.C. §§ 12101 et seq.). He also tried to separate his "reasonable accommodation" claim into both a Title I and Title II claim. *See:* 42 U.S.C. §§ 12111-12112 and 42 U.S.C. §§ 12131-12132. The District Court found that Petitioner was not disabled within the meaning of the ADA and granted summary judgment in favor of the Respondent. The District Court also ruled on the "association discrimination" claim, holding that Petitioner had not stated a cause of action under 42 U.S.C. § 12112(b)(4) because he was not an employee of the medical school and that he had not shown that he was discriminated against because of his association with his disabled son.

On appeal, Petitioner argued that disputes of material fact existed on the issues related to Petitioner's disability, his entitlement to a reasonable accommodation, the medical school's grading policy, whether he was an employee of the medical school, and the "association claim." The Tenth Circuit Court of Appeals determined that Petitioner's disorder, as he described it, does not constitute a disability under the ADA, and affirmed dismissal of the Title II and Rehabilitation Act claims. On the question of the "reasonable accommodation claim," the Tenth Circuit determined that Petitioner could not "demand an unreasonable accommodation from the medical school" and then claim a violation of the ADA based

on denial of such an accommodation. The Tenth Circuit also held that because Petitioner's accommodation claim was unreasonable, summary judgment would have been appropriate even if Petitioner had shown a disability under the ADA. As to any possible claim under Title I, the Tenth Circuit determined that Petitioner was not an employee of the medical school nor had he satisfied the discrimination element of 42 U.S.C. § 12112(b)(4).

The facts upon which the District Court and the Tenth Circuit based their determinations and findings are a matter of record and are clearly stated in their respective opinions. Petitioner's rendition of the "facts," in his petition, includes unsupported statements, incomplete statements of fact, and new allegations. The medical school was informed by the Petitioner of his "test-anxiety" at the beginning of the basic biochemistry course and was also informed that he did not require any test-taking accommodations. It was suggested that he visit with the medical school's clinical psychologist about his "test-anxiety." He was informed of the grading policy for the basic biochemistry course. As to the remaining "facts" found in the petition, they are clear misstatements. Petitioner asserts that his disorder is related to learning in the specific subject areas of chemistry and mathematics, but testified that he does not claim to have a learning disability. He claims to have "achieved an acceptable final overall average" and "an acceptable passing grade" in basic biochemistry despite his disorder. The "reasonable accommodation" that he states he requested, but was denied, was that the professor set a clear grading standard for the course, that he not "deviate from their grading policy," and that he not regard him as lazy. The

grading policy provided to the District Court by the Respondent was textually correct.

The determinations, findings, and law relied upon by the District Court and the Tenth Circuit are set forth in their respective opinions. In Petitioner's verified complaint, the name for the disorder that he claims was not reasonably accommodated was "test-anxiety." Contrary to his assertion, the court did not rename his disorder. The District Court did determine that Petitioner's "impairment" of "feeling test anxiety in two discrete subjects matters that do not require special accommodations in testing situations is neither significant nor severe." The District Court also determined that "there has been no permanent impact resulting from the impairment that has prevented him from getting a degree in chemistry and psychology or from obtaining extremely profitable employment." The District Court and the Tenth Circuit assessed whether the Petitioner's impairment substantially limited a major life activity using a number of factors, including his ability to mitigate his anxiety in chemistry and math by altering his study habits. Based on the record from the District Court, the Tenth Circuit Court of Appeals determined that "an impairment limited to specific stressful situations," is not a disability under the ADA or the Rehabilitation Act. The Tenth Circuit also determined that Petitioner's "reasonable accommodation" claim of requesting that a professor not deviate from a grading policy, and then requesting a grade change on the belief that the policy was not followed, was unreasonable.

REASONS WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD NOT BE GRANTED

The Petition for Writ of Certiorari should not be granted because this case raises no compelling issues that warrant review by this Court. Petitioner's questions presented and the arguments in support do not raise any compelling reasons for granting the writ. For the most part, Petitioner's asserted reasons for review are based on asserted errors by the Tenth Circuit and the District Court relating to factual findings and the application of a properly stated rule of law. Petitioner has attempted to raise new issues and facts, in his petition, that were not raised or presented to the courts below. Petitioner's arguments regarding the misapplication of the law, by the Tenth Circuit and the District Court, applicable to his disability and denial of a reasonable accommodation claim(s) are based on a fundamental misunderstanding of the law surrounding the ADA. Petitioner's questions presented and arguments in support, as related to his alleged employment status, the related Title I claim(s), and the Respondent's grading policy, are all without merit. For these reasons and those stated below, this Court should not grant the Petition for Writ of Certiorari.

A. PETITIONER'S APPENDIX C SHOULD NOT BE CONSIDERED BY THIS COURT BECAUSE IT WAS NEVER PART OF THE TENTH CIRCUIT OR DISTRICT COURT RECORD AND IT WAS NEVER ENTERED IN THIS CASE AS CONTEMPLATED IN SUPREME COURT RULE 14(1)(i)(ii)

Even after having been admonished in an order of the Tenth Circuit Court of Appeals for attempting to

include in the appellate appendix in this case evidence and documents that were not part of the district court's record, Petitioner now seeks to do the same in this Court. The document found in Petitioner's Appendix C was never part of the record before the District Court or the Tenth Circuit Court of Appeals. It was never made a part of this case by the Petitioner. The document was never entered in this case by any court or administrative agency as contemplated by Supreme Court Rule 14(1)(i)(ii). Pursuant to Supreme Court Rule 26(2), submission to this Court of the document found in Appendix C would not be allowed if this petition were granted. Its inclusion in the petition is inexcusable and should preclude any review of the petition for the Writ of Certiorari by this Court.

B. THE PETITION MISREPRESENTS THE TENTH CIRCUIT'S CONSIDERATION OF THIS COURT'S OPINION IN *BRAGDON VS. ABBOTT*

The Tenth Circuit's analysis of whether Petitioner's mental impairment substantially limited a major life activity was consistent with this Court's opinion in *Bragdon v. Abbott*, 524 U.S. 624, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998).[1] Petitioner's claim of errors by the Tenth Circuit

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[1] Petitioner's attempt to have this court consider the matters and statements found in Appendix C is improper. Appendix C was never part of the record below. As such, issues related to Appendix C could never have been considered by the Tenth Circuit in its opinion or review. Generally, this Court does not consider matters raised for the first time in a petition for

highlights his fundamental misunderstanding of the ADA and the process, as set forth by this Court in *Bragdon* and followed by the Tenth Circuit in this case, for consideration of whether or not an individual has a disability under the ADA. *Id.* at 2202. The District Court and the Tenth Circuit, as was undisputed by the parties, determined that Petitioner had an "impairment." Contrary to Petitioner's assertion in his Petition for Writ of Certiorari (pages 17-22) of "irrational prejudice" and "stereotyping" on the part of the Tenth Circuit and the District Court, his "anxiety disorder" was recognized as a "mental impairment" as defined by the ADA. (Tenth Circuit Opinion at p. 5, Petitioner's Appendix A at 11-VIII). Petitioner's misunderstanding appears to be based on the erroneous assumption that a finding of a "mental impairment" terminates further analysis, by a court, for a finding of a "disability" under the ADA.[2]

The next step for the District Court and the Tenth Circuit was to determine whether or not the life activity upon which the Petitioner relies constitutes a "major life activity." As this Court recognized in *Bragdon* and the Tenth Circuit cited in its opinion, in order to be considered a major life activity, that activity must be significant.

Writ of Certiorari. *See: Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n.2, 90 S.Ct. 1598, 1602, n.2, 26 L.Ed.2d 142 (1970). Petitioner's submission of Appendix C and attempt to assert issues for review related to it is conduct inconsistent with the rules of this Court and of Appellate procedure.

[2] Petitioner has asserted that he has a "anxiety disorder related to learning." That assertion only provides for a finding of a possible "mental impairment," as defined by 29 C.F.R. § 1630.2(h) (1998).

Bragdon, 118 S.Ct. at 2202. Petitioner never specified exactly what "major life activity" he claimed was substantially limited by his impairment. The District Court and the Tenth Circuit looked at the facts in their attempt to discern the "activity" that Petitioner was claiming. The District Court found that Petitioner's alleged activity was "rather hazily defined" and defined it as the ability to demonstrate competence in the specific subject areas of chemistry and mathematics in exam settings. (District Courts Opinion at p. 5 and Appendix B at 12-VII). The Tenth Circuit, relying on the District Court's attempt to discern what Petitioner was relying on as the "major life activity," defined the activity as "academic functioning." (Tenth Circuit Opinion at p. 8 and Appendix B at 11-IX).[3] Petitioner's alleged activity, as defined by the District Court and the Tenth Circuit, is not related to any of the activities listed in the ADA and Rehabilitation Act regulations. (*See:* 45 C.F.R. § 84.3(j)(2)(ii) (1997); 28 C.F.R. § 41.31(b)(2) (1997) and 29 C.F.R. § 1630.2(i) (1998).

While test-taking may be a component of academic functioning and all-around academic functioning might be considered a "major life activity," subject-specific test-taking is not an activity in and of itself. (*See: Pack v. Kmart Corp.*, ___ F.3d ___, No. 97-7120, 1999 WL 51882, at *3 (10th Cir. Feb. 4, 1999) and *Poindexter v. Atchison, Topeka, and Santa Fe Railway Co.*, ___ F.3d ___, No. 97-3273, 1999 WL 92255, at *3-4 (10th Cir. Feb. 24, 1999). Proficiency at

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[3] Petitioner's failure to specifically plead or define the "major life activity" upon which he relies is a fatal defect and should preclude any further consideration of this case by this Court.

taking tests in any one subject matter is not worthy of inclusion under the statutory definition of "major life activity" under the ADA. Contrary to Petitioner's assertion, the Tenth Circuit expressly acknowledged that it had to look beyond the public, economic, and daily dimensions to determine the significance of the activity and its comparative importance. (Tenth Circuit Opinion at p. 7, Petitioner's Appendix A at 11-VIII). The District Court and the Tenth Circuit properly determined that the activity of taking tests in two specific academic subject areas is neither significant nor "major" as contemplated by this Court's holding in *Bragdon*. The diminished ability to demonstrate proficiency in a specific subject matter may touch on a component of a "major life activity," but standing alone it is "insufficiently fundamental." *See: Colwell v. Suffolk County Police Dept.*, 158 F.3d 635, 642 (2nd Cir. 1998). If claimants were allowed to define a "major life activity" in such a narrow way, it would defeat the intent of the ADA. *Id.* at 642. Without specifically ruling as to whether or not it (academic functioning as related specifically to test-taking in a basic biochemistry course in medical school) constituted a "major life activity," the District Court and the Tenth Circuit moved on to the third step of the analysis.

Petitioner's allegation of error by the Tenth Circuit and the District Court, as can best be discerned from his petition to this Court, is really based on the application by those courts of the third step in the analysis of disability under the ADA. As this Court stated in *Bragdon*, 118 S.Ct. at 2202, the third step for a court is to ask, "tying the two statutory phrases together,. . . . whether the

impairment substantially limited the major life activity." In that regard, the District Court made that determination of law using the factors found in 29 C.F.R. § 1630.20(2). As to the nature and severity of Petitioner's impairment, the District Court concluded that "feeling test anxiety in two discrete subject matters that do not require special accommodations in testing situations is neither significant nor severe." (District Court Opinion at p. 5 and Appendix B at 12-VII). As to the remaining factors, the District Court could find no permanent or long-term impact resulting from his impairment related to the subject areas of chemistry and mathematics. It was impossible for the District Court, when considering these factors, to overlook the fact that Petitioner has an undergraduate degree in the specific subject in which he claims his impairment manifests itself during testing situations. The District Court's conclusion that his impairment had not prevented him from obtaining undergraduate and graduate degrees or from profitable employment demonstrates that there has been no substantial limitation on Petitioner's ability to demonstrate competence in a variety of subject matters or on the "major life activity" of working. Such a determination goes to both the nature and severity of the impairment and the permanent or expected long-term impact of such an impairment. (*See:* 29 C.F.R. § 1630.20(2)).

The Tenth Circuit looked at the same factors. (Tenth Circuit Opinion at p. 7, Petitioner's Appendix A at 11-VIII and 11-IX) As the Tenth Circuit correctly determined, had Petitioner demonstrated that his impairment impeded his performance in a wide variety of disciplines or affected him in all testing situations, that might (like

having an impairment that prevented a person from working at a variety of jobs) be significant and fundamental. The Tenth Circuit went further and looked at the "actual effect" of Petitioner's impairment on his first-year of medical school and correctly concluded that the fact that his "poor performance did not require that he leave the program" and "he could have repeated the first year" negated a finding of disability under the ADA. Contrary to Petitioner's assertion of error, consideration of the actual effect of an impairment on a life activity is pivotal to the ADA disability analysis. (*See: Land v. Baptist Medical Center*, 164 F.3d 423, 424-425 (8th Cir. 1999) and *Robinson v. Global Marine Drilling Co.*, 101 F.3d 35, 37 (5th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 1820, 137 L.Ed.2d 1028 (1997)). Having to study harder to achieve success in certain academic subjects is not, by any standard, a significant or substantial effect on a person's life.

Even if the Tenth Circuit had used 29 C.F.R. § 1630(j)(1) instead of 29 C.F.R. § 1630.20(2) in its analysis, the result would have been the same. (*See: Land v. Baptist Medical Center*, 164 F.3d 423, 424-425 (8th Cir. 1999). 29 C.F.R. § 1630(j)(1) uses performance or significant restriction in comparison to the general population to define the term "substantially limits." The facts demonstrate that Petitioner is clearly able to perform on exams involving mathematics and chemistry as well as the average person in the population. The average person does not have an undergraduate degree in chemistry and a Ph.D. in psychology. The average person in the population does not find themself in medical school taking basic biochemistry exams. The facts demonstrate that Petitioner is also not significantly restricted (as to the condition, manner or

duration) in his performance in chemistry and mathematics exams as compared to the average person. Application of the Tenth Circuit's determination that Petitioner had failed to "demonstrate that his anxiety impedes his performance in a wide variety of disciplines," would not have led to any different conclusion had it been analyzed under 29 C.F.R. § 1630.2(j)(1). The Tenth Circuit correctly decided that Petitioner does not have a qualifying disability under the ADA. Review by this Court is not warranted.

C. THIS COURT SHOULD NOT GRANT CERTIORARI ON THE ISSUE OF THE TENTH CIRCUIT'S CONSIDERATION OF MITIGATING MEASURES BECAUSE, IN THIS CASE, IT WAS CONSISTENT WITH THE APPLICABLE REGULATIONS AND GUIDELINES.

Contrary to Petitioner's assertions of error and his questions presented, as they relate to the determination of a "disability" and the consideration of mitigating measures, the Tenth Circuit's treatment in this case was entirely consistent with the applicable regulations and the EEOC's guidelines. Those guidelines indicate that the "determination of whether an individual is substantially limited in a major life activity" must be made "without regard to mitigating measures such as medications, or assistive or prosthetic devises." 29 C.F.R. Pt. 1630 App. § 1630.2(j). The Fifth Circuit Court of Appeal, in *Washington v. HCA Health Services of Texas, Inc.*, 152 F.3d 464, 471 (1998), determined that "whether mitigating measures should be taken into account must be determined on a case by case basis." Consideration of the past, present, and future effect of an impairment is necessary in order

to determine the nature, severity, condition, manner, duration, or long-term impact of an impairment on a major life activity – especially in a case like this where subject-specific academic functioning is at issue. Studying harder as a measure to ameliorate the impact of an impairment is not like taking a medication or using a prosthetic device. It is not outside the ordinary or average for an individual to study harder for one academic subject in order to achieve satisfactory performance in that subject. While it is true that there is division in the circuits as to use of mitigating measures as contemplated in 29 C.F.R. Pt. 1630 App. § 1630.2(j), this case, contrary to Petitioner's assertions, does not touch on those types of inquiries.[4] Petitioner's record of academic achievements, the lack of need for accommodations, and his success in working in the field of chemistry is not, as Petitioner asserts, a history of mitigation measures. It is, however, a history of no permanent or severe impact on any life activity, major or minor. Inquiry into the past, present, and future impacts of an impairment, as used to assess whether Petitioner's impairment substantially limits an unspecified activity (subject-specific academic functioning) is consistent with the regulations. (*See:* 29 C.F.R. Pt. 1630 App. § 1630.2(j); 29 C.F.R. § 1630.20(2); and 29 C.F.R.

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[4] Respondent acknowledges that this Court is in the process of reviewing the use, by courts, of mitigating measures as contemplated in 29 C.F.R. Pt. 1630 App. § 1630.2(j). (*See: Sutton v. United Airlines, Inc.*, 130 F.3d 893 (10th Cir. 1997), *cert. granted*, 67 U.S.L.W. 3433 (U.S. Jan. 8, 1999) (No. 97-1973). However, this case is much different than those under review and, even if this Court were to determine that mitigating measures should not be considered, such a decision would not change the outcome in this case.

§ 1630.2(j)(1)). Such an inquiry is an essential part of the comparative importance and average person analysis mandated by these regulations and guidelines. The Tenth Circuit's consideration of Petitioner's impairment, and their attempt to find some past or present substantial impact or limitation on a life activity, were both proper and do not warrant review by this Court.

D. THIS COURT SHOULD NOT GRANT REVIEW BECAUSE, AS THE TENTH CIRCUIT CORRECTLY DETERMINED, PETITIONER'S "REASONABLE ACCOMMODATION" CLAIM WAS UNREASONABLE.

Petitioner has misrepresented his claim as it relates to the alleged denial of a reasonable accommodation. Functionally, Petitioner's claim is nothing more than a simple grading dispute disguised as an ADA claim. Petitioner's claimed theory of "reasonable accommodation" flies in the face of every decision regarding a failure to provide a reasonable accommodation in the academic setting. *See*: *Bartlett v. New York State Bd. of Law Examiners*, 156 F.3d 321 (2nd Cir. 1998); *Argen v. New York State Board of Law Examiners*, 860 F.Supp. 84 (W.D.N.Y. 1994); *Petition of Rubenstein*, 637 A.2d 1131 (1994); *Ellis v. Morehouse*, 925 F.Supp. 1529 (N.D.Ga. 1996); *Wynne v. Tufts University School of Medicine*, 932 F.2d 19, 26 (1st Cir. 1991) and *Clark v. Virginia Board of Bar Examiners*, 861 F.Supp. 512 (E.D.Vir. 1994).[5]

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[5] In each one of these cases, there was substantial documentation of impairments that substantially limited the individual ability to learn, process information, or take tests in

This Court in *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225, 106 S.Ct. 507, 513, 88 L.Ed.2d 523 (1985) held that: "when judges are asked to review the substance of a genuinely academic decision,. . . . they should show great respect for the faculty's professional judgment" and that "plainly, [judges] may not override [the faculty's professional judgment] unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." Petitioner's claimed accommodation request for his impairment, that the medical school not "deviate from the grading policy," and the later claim of a denial of that request and further request for a grade change, is nothing more than a request for judicial review of the substance of a genuinely academic decision. Petitioner's request that this Court hold that the Respondent's grading policy is illegal is further proof of the true nature of this case. Petitioner's real displeasure is centered on the medical school's grading policy and the exercise of professional judgment that resulted in the assignment of a "marginal" grade in basic biochemistry. Even more illustrative is Petitioner's new and unsupported allegation, in his petition, that he was assured that his evaluation in medical school would not be based upon competition with others. (*See:* Petition for Writ of Certiorari at p. 6) Competition among students is at the heart of undergraduate and graduate education. Contrary to Petitioner's assertion of

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all subjects, not just a specific subject. The "major life activities" identified in those cases were not test-taking, but something more fundamental like reading or processing written information.

"irrational prejudice" and "trivalization" on the part of the Tenth Circuit, his shifting accommodation claims were correctly decided by the Tenth Circuit and the District Court. Review, by this Court, of any of those claims and those surrounding the grading policy is not warranted.

E. PETITIONER'S REQUEST FOR REVIEW BY THIS COURT TO CLARIFY THE MEANING OF EMPLOYMENT UNDER TITLE I OF THE ADA IS WITHOUT MERIT.

Petitioner, as a medical student, is not employed by the medical school and there was no evidence of a cognizable employment relationship. There is no confusion or division among the circuits, or any other courts, as to this question that would warrant any review by this Court. As the Tenth Circuit correctly concluded: "[U]nless a student receives remuneration for the work he performs, he is not considered an employee. (*See: O'Connor v. Davis*, 126 F.3d 112, 116 (2nd Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1048, 140 L.Ed.2d 112 (1998)." (*See also: Graves v. Women's Prof'l Rodeo Ass'n*, 907 F.2d 71, 72-73 (8th Cir. 1990)). There is nothing in the record to show that Petitioner had an employer-employee relationship with the Respondent under any definition. Petitioner's claims, based on Title I of the ADA, cannot be considered in the absence of such a relationship. This is not a matter worthy of this Court's review.

CONCLUSION

For the reasons given above, the Petition should be denied.

Respectfully submitted,

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No. 98-1241

In The

Supreme Court of the United States

October Term, 1998

KEVIN M. McGUINNESS,
Petitioner,

vs.

UNIVERSITY OF NEW MEXICO SCHOOL OF MEDICINE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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1. NEW ISSUES PRESENTED

- Whether, in light of the Court's acceptance of certiorari in *Sutton vs. United Airlines*, ___ U.S. ___, 119 S.Ct. 790 (*cert. granted* Jan. 8, 1999), a case in which the central issue is whether a disability should be assessed without regard to the availability of mitigating measures, this case should be held in abeyance pending the outcome of *Sutton*.

- Whether, in the alternative, and in light of the Court's acceptance of certiorari in *Sutton vs. United Airlines*, a case which addresses the issue of whether a physical disability should be assessed without regard to the availability of mitigating measures, this case, which addresses psychological disability in the same context, should be heard on certiorari and consolidated with *Sutton*.

- Whether Respondent's arguments that Petitioner has improperly characterized the record have merit.

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ADDITIONAL REASONS FOR GRANTING THE WRIT

A. THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE BECAUSE CERTIORARI HAS BEEN GRANTED IN *SUTTON vs. UNITED AIRLINES*, A CASE WHICH ADDRESSES THE "MITIGATING MEASURES" ISSUE IN THE CONTEXT OF PHYSICAL DISABILITY

On January 8, 1999, which was close to the filing date of this petition, this Court granted a petition for writ of certiorari filed by the Plaintiff in *Sutton vs. United Airlines*, 130 F.3d 893 (10th Cir. 1998). ____ U.S. ____, 119 S.Ct. 790 (*cert. granted* January 8, 1999). Briefing is pending in that case.

Sutton was relied upon heavily by the Tenth Circuit in deciding the case at bar. *See* Tenth Circuit Opinion, Appendix A to Petition for Writ of Certiorari, at p. V-XI ("Under the law of this circuit, we must consider the plaintiff's ability to mitigate his impairment in determining if that impairment substantially limits a major life activity." Citing *Sutton*.)

In fairness to the Petitioner here, and in light of the granting of certiorari in *Sutton*, the Court should either grant certiorari in this case, which presents the companion issue of mitigating measures in the case of psychiatric disability, or hold this petition in abeyance pending the outcome of *Sutton*, and decide this case accordingly.

B. THIS COURT SHOULD GRANT CERTIORARI BECAUSE RESPONDENT'S ARGUMENTS THAT PETITIONER HAS MISCHARACTERIZED THE RECORD IN THIS CASE ARE DEVOID OF ALL MERIT.

Respondent, in its Response to Dr. McGuinness' petition for writ of certiorari, argues repeatedly that he has in various instances mischaracterized the record. These arguments are devoid of all merit.

As regards the existence of Petitioner's disability, it is law of the case. (See Tenth Circuit opinion, Appendix A to Petition, at p. 5-VII ("The parties agree that Mr. McGuinness has an 'anxiety disorder ....'")) Despite findings by both the trial court and the Tenth Circuit Court of appeals to this effect, Respondent attempts, in its Brief in Opposition, to rewrite the record with multiple misstatements, to wit:

(1) On page 1 of Respondent's Brief Petitioner's verified complaint is quoted where Dr. McGuinness 'asserted that he suffered from "an anxiety disorder." On page 4 of the very same Brief in Opposition, Respondent quotes Dr. McGuinness' verified complaint, once again, stating "the name of the disorder was "test anxiety"." In fact, Respondent takes the entire verified complaint out of context in an attempt to swindle this court.

The actual quote from Dr. McGuinness' verified complaint regarding his disorder is as follows:

> Plaintiff suffers with an anxiety disorder, and has had this condition at all times relevant to this complaint.

The actual quote from Dr. McGuinness' verified complaint regarding the context in which his disorder continued to require accommodation is as follows:

> Plaintiff sought reasonable accommodation from the defendant in the context of test anxiety.

Dr. McGuinness was addressing the context of his need for reasonable accommodation. He was not defining the scope or limits of his disorder.

(2) On page 3 of Respondents' brief it is reported that 'the suggestion was made that [Dr. McGuinness] visit with the medical school's clinical psychologist about his "test anxiety".' This is a clear device to trivialize the truth. In fact, Dr. McGuinness' verified complaint states:

> Prior to taking the Biochemistry course as a first-year students' required course, Plaintiff advised Dr. Reyes in October 1992 that Plaintiff had a clinical condition involving debilitating anxiety. Plaintiff described the symptoms of this condition and the impact of his condition upon his academic performance.
>
> After informing his instructor Dr. Reyes Plaintiff was referred to Dr. Michael O'Donnell, a

clinical psychologist on staff at the medical school, who was made aware of Plaintiff's disability.

Once again the facts are misrepresented to this court by the Respondent, not by the Petitioner.

(3) On page 3 of Respondent's brief Respondent attempts to lend to Dr. McGuinness its own misunderstanding of the differences between technical terms, such as "learning related disorders", "learning disabilities", "learning disorders", "anxiety disorders", etc. These are not terms that can be clearly understood without expert testimony. It cannot be assumed that the meaning ascribed to such terms by an expert forensic psychologist, such as Dr. McGuinness, is the same meaning that is understood by Respondent. Such decisions are reserved for a finder of fact after a full trial on the merits.

(4) There are many other deceptive devices used in the pages of Respondent's brief. The pattern is clear. Although Respondent alleges the it is Petitioner whose "rendition of the "facts," in his petition, includes unsupported statements, incomplete statements of fact, and new allegations, Respondents does not demonstrate any of these to this court. Yet, Respondent's statements to this court are demonstrably distorted or outright false.

Finally, as regards Respondent's argument that Petitioner has improperly included in Appendix C of his Petition a decision letter by the United States Department of Education, Supreme Court Rule 14(i)(ii) clearly calls for the inclusion of

opinions of administrative agencies and Supreme Court Rule 14(i)(vi) clearly calls for the inclusion of "any other material the petitioner believes essential to understand the petition." Respondent's vehement argument that Petitioner has acted improperly is therefore clearly without merit. Petitioner has merely included, in accordance with the rules, material which he feels will be useful to the Court in understanding the background of the case.

While it might be correctly argued that Respondent's accusations represent the continuation of what has been an unusually oppressive course of conduct by the University of New Mexico School of Medicine in defending this case, it is Petitioner's far greater concern that the issues addressed in the Petition, which are timely, clearly preserved and presented, and essential to the development of the law, be heard by the Court. Petitioner therefore does not wish to beleaguer the point of opposing counsel's conduct. Respondent's allegations regarding Petitioner's alleged mischaracterization of the facts of this case are without merit, and should have no bearing on the Court's decision herein.

CONCLUSION

For the reasons stated, it is respectfully requested that this Court grant the petition on writ of certiorari. The Court is also respectfully requested to consider whether this case should be consolidated with *Sutton vs. United Airlines*, ____

U.S. ____, 119 S.Ct. 790 (*cert. granted* Jan. 8, 1999), or to hold this case in abeyance pending the outcome of *Sutton*.

Respectfully Submitted:

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